(4)

No. 05-970

In the Supreme Court of the United States

JAMES M. BANNER, JR., *ET AL., Petitioners,*

v.

THE UNITED STATES OF AMERICA, *ET AL., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE DISTRICT OF COLUMBIA CHAMBER OF COMMERCE, FEDERAL CITY COUNCIL, DISTRICT OF COLUMBIA AFFAIRS SECTION OF THE DISTRICT OF COLUMBIA BAR, *ET AL.*, IN SUPPORT OF PETITIONERS

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LIST OF AMICI CURIAE[1]

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INTEREST OF THE AMICI CURIAE

Amici are the District of Columbia Chamber of Commerce, the Federal City Council, the District of Columbia Affairs Section of the District of Columbia Bar (the "D.C. Affairs Section"), certain individuals who are former presidents of the District of Columbia Bar (the "former Bar presidents"), the Federation of Citizens Associations of the District of Columbia, and the Washington, D.C. Federation of Civic Associations.[2]

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[1] The parties have consented to the filing of this brief under Supreme Court Rule 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] With respect to the D.C. Affairs Section and the former Bar presidents, the views expressed herein are those of such Section and individuals, respectively, and not those of the D.C. Bar or its Board of Governors.

The District of Columbia Chamber of Commerce is the Washington D.C. metropolitan region's largest chamber of commerce, with over 2000 members from the private and nonprofit sectors. The Federal City Council is a business-supported, non-profit, non-partisan organization that works for the improvement of the Nation's Capital. It is composed of and financed by two hundred of the Washington, D.C. area's top business, professional, educational, and civic leaders. The D.C. Affairs Section is concerned with the laws and government of the District of Columbia (the "District"). Its membership includes both individuals who live in the District and individuals who live elsewhere. The Federation of Citizens Associations of the District of Columbia was founded in 1910 and has over forty-five member associations, most of which have several hundred members. The purposes of the Federation are to work for the strengthening of residential communities and neighborhoods and to further the interests of the people of the District. The Washington, D.C. Federation of Civic Associations was founded in 1921 and represents over forty citizens and member associations. It is dedicated to informing, supporting, and representing the residents of the District and is a recognized voice for the District's general welfare.

Amici have a keen interest in the economic health and well-being of the District of Columbia. In the case of the amici D.C. Affairs Section and former Bar presidents, such interest arises because the District is where its members, or they, as the case may be, practice or have practiced their profession. In the cases of the Federation of Citizens Associations of the District of Columbia and of the Washington, D.C. Federation of Civic Associations, it is because the District is where the members of their member organizations live. In the case of the Federal City Council, it

is because its mission is to work for the improvement of the Nation's Capital. And in the case of the District of Columbia Chamber of Commerce, it is because its members operate their businesses there.

All amici are concerned that the continued federal ban found at D.C. Code § 1-206.02(a)(5) on the District government's ability to tax the income of those who work in the District but live elsewhere (the "Prohibition") seriously threatens the economic vitality of the District of Columbia. Amici further believe that the District is treated inconsistently and unfairly when compared to all other states and territories that choose to impose an income tax.[3]

Although the District has managed to reverse the financial insolvency that prompted Congress to create a financial control board a decade ago, an in-depth study by Congress' own investigative arm, the Government Accountability Office ("GAO") (formerly known as the General Accounting Office), shows that this recent fiscal success is not sustainable. According to the GAO, this bleak outlook is the result of a "structural imbalance" in the District's ability to raise revenue to provide basic services, a key aspect of which is the Prohibition. *See District of Columbia: Structural Imbalance and Management Issues*,

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[3] Some of the individual amici live and work in the District. Others work in the District but live elsewhere. Still others, by virtue of retirement or relocation, neither work nor live in the District. Consequently, the elimination of the Prohibition and its replacement by a reciprocal income tax credited against their own state income taxes will most likely affect them in their respective capacities as individual taxpayers differently. Despite those differences, the individual amici join in submitting this brief because they share a common interest in the continued vitality of the District.

GAO 03-666 (May 2003) at 8-9 (hereinafter "GAO Report"). Amici are deeply concerned that, because of this structural imbalance, the District will once again become fiscally insolvent or will be unable to provide an adequate level of basic governmental services. Either would be detrimental to the District's economy and well-being.

Amici also are troubled by the Prohibition's unfairness. The federal government does not impose a similar ban on any other jurisdiction in the United States. Consequently, each of the forty-one states that imposes an income tax on individuals applies that tax to nonresidents who work in the state. Moreover, the Prohibition was enacted at the behest of the representatives of the several States, which enjoy voting rights in the Congress of the United States, while the District does not. Just as importantly, the Prohibition – both in its own right and because the resulting structural imbalance contributes to an environment of uncertainty, inadequate services and decaying infrastructure – unfairly discriminates against the District in its effort to attract and retain residents and employers and to promote economic opportunity for its citizens.

Amici believe that the District's economic future is jeopardized by the Prohibition. Therefore, amici urge the Court to grant the petition for a Writ of Certiorari and review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

SUMMARY OF ARGUMENT

In the proceedings below, Petitioners raised serious questions about the constitutionality of the Prohibition. The amici agree with Petitioners that this case presents important

issues that this Court should consider. Amici also agree with Petitioners that, if the Writ is granted, this Court should hold, after hearing this case, that heightened scrutiny is required and that the Complaint should be reinstated so that such scrutiny may be applied.

The amici do not address in this brief the substantial questions of constitutional law which they believe the Petition presents, leaving that task to Petitioners' Brief. They wish, instead, to emphasize through their arguments here two points in that brief regarding the nature of the Prohibition and its effect on the District which they believe underscore why those constitutional issues, as present in this case, are important enough to warrant review by this Court. The first is that the Prohibition is a singular limitation on the rules otherwise generally followed and applied by governments regarding the reach of their tax authority. Thus, both it and the discrimination effected thereby are unique. The second is that the Prohibition seriously undermines and jeopardizes the future fiscal health of the District because of its severe detrimental effect on the District's finances and ability to provide basic services. For these reasons as well as for the reasons set forth in Petitioners' Brief, and in light of the District's significance as the Seat of Government, this case is worthy of the Court's review.

ARGUMENT

I. THE PROHIBITION IS THE ONLY LAW OF ITS KIND IN THE UNITED STATES.

A. The Universal Rule of Taxation is That Income is Taxed at Its Source.

It is fundamental that a jurisdiction can tax income earned within its borders. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n.11 (1995); *Shaffer v. Carter*, 252 U.S. 37, 52 (1920); Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 6.03 (3d ed. 1999) ("There are two fundamental, but alternative, predicates for state power to tax income: residence and source."). This fundamental rule is rooted in the principle that the cost of government should be paid for by those who benefit from it. *See Oklahoma Tax Comm'n*, 515 U.S. at 463; *Shaffer*, 252 U.S. at 52-53.

For a state's residents, the "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government." *Oklahoma Tax Comm'n*, 515 U.S. at 463 (quoting *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937)). For nonresidents, the "very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident . . . to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes . . . ." *Shaffer*, 252 U.S. at 53. Indeed, taxing income according to source is such a bedrock concept that the leading commentators on state taxation have noted that, if for Constitutional reasons (such as to avoid double taxation

under the Commerce Clause) a choice had to be made between taxing by residence or by source, taxing by source would in their view trump taxing by residence. *See* Hellerstein & Hellerstein, *State Taxation* ¶ 6.03.

This Court first recognized the right of a jurisdiction to tax the income of nonresidents in 1920 in *Shaffer v. Carter*. Noting that a government may "resort to all reasonable forms of taxation in order to defray . . . government expenses" and that income taxes are a favored method of distributing the burdens of government, the Court held that a nonresident who holds a job or operates a business in a state has an *obligation* to pay for the cost of that state's government, from which the nonresident benefits. *Shaffer*, 252 U.S. at 50-53.

B. The Rule is Followed by the United States and Every State that Imposes an Income Tax.

As noted above, it is fundamental that a jurisdiction can tax the income earned within its borders. Just as importantly – and what makes the Prohibition so astonishingly unique – both the United States and every state that imposes an income tax exercise this authority.

Thus, the United States taxes the income of nonresidents earned within its borders, although the Executive Branch (with the consent of the Senate) may choose to limit this in bilateral treaties entered into with other countries. *See* 26 U.S.C. §§ 871(a) and 871(b) (taxation of nonresident individuals on interest, dividends, royalties, etc. and on trade or business income, respectively, derived from within the U.S.) and 26 U.S.C. §§ 881(a) and 881(b) (same for foreign corporations). Indeed, United States income tax